Supreme Court, U.S.
FILED

No. 05-05-610

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In The
Supreme Court of the United States

WILLIAM HARRY WILSON,

Petitioner,

v.

DELTA STATE UNIVERSITY, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 704(a) of Title VII of the 1964 Civil Rights Act forbids discrimination against an employee "because he has opposed any practice made an unlawful employment practice by" Title VII. Twelve circuits have held that section 704(a) prohibits retaliation against an employee who reasonably believed that the practice which he or she opposed was forbidden by Title VII. The Questions Presented are:

(1) Does section 704(a) protect an employee who reasonably but mistakenly believed the practices he or she opposed were unlawful if that mistake was based on an error of *law*.

(2) Does an individual who opposed practices he or she believed were unlawful under Title VII lose the protections of section 704(a) retroactively if the court of appeals holds, *after* the individual objected to those practices, that the practices in question did not violate Title VII?

PARTIES

The petitioner is William Harry Wilson.

The respondents are Delta State University, Dr. David Potter, in his official capacity as President of Delta State University, The Board of Trustees of State Institutions of Higher Learning, Dr. Thomas D. Layzell, in his official capacity as Commissioner of the Board of Trustees of State Institutions of Higher Learning, and Thomas W. Colbert, William S. Crawford, Ricki Garrett, J. Roy Klumb, Dr. D. E. Magee, Jr., Virginia Shanteau Newton, Dr. L. Stacy Davidson, Jr., Bryce Griffis, Dr. Bettye H. Neely, Scott Ross, Amy Whitten and Carl Nicholson, Jr., in their official capacities as members of the Board of Trustees of State Institutions of Learning.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Harry Wilson respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 12, 2005.

OPINIONS BELOW

The August 12, 2005 opinion of the court of appeals, which is reported at 143 Fed. Appx. 611, is set out at pp. 1a-7a of the Appendix. The August 24, 2004 order of the district court, which is not officially reported, is set out at pp. 8a-11a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 12, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title. . . .

STATEMENT OF THE CASE

This case arose out of a controversy regarding the position of Chief Information and Planning Officer at Delta State University. Petitioner Wilson had been employed at Delta State since 1983. In 1995 Wilson completed his Ph.D. dissertation at Delta State; that dissertation proposed the creation of an administrative position at the university to coordinate certain information technology and planning functions.

In the fall of 2000 Delta State created the very position that Wilson had proposed, which the university titled Chief Information and Planning Officer. University officials, however, did not announce the vacancy in that newly created job, or permit university employees or others to apply for it. Instead, the university summarily appointed Dr. Michelle Roberts to the position. Dr. Wilson had hoped to obtain this new position if and when it was established, and objected to the manner in which it was awarded to Roberts.

On April 20, 2001, Wilson met with the university president, Dr. David Potter, to discuss a number of matters. During the course of that discussion Wilson complained about the appointment of Roberts. Wilson asserted that the university had violated its own rules by failing to advertise the position, and argued that Roberts was not competent to do the job. Wilson further objected that Roberts had only been given the job because she had had (or was having) a romantic relationship with a university administrator who was involved in the appointment decision. (App. 2a).

Shortly thereafter, for reasons that remain in dispute, university officials decided to dismiss Dr. Wilson. On June

29, 2001, Dr. Potter informed Wilson that his position was being eliminated and that his contract would not be renewed. Wilson's employment at Delta State ended on July 1, 2001. Shortly thereafter, Wilson contended, Delta State created a new position that was essentially the same as Wilson's old job, and then filled it with a new employee.

On November 28, 2001, Dr. Wilson filed a charge with the EEOC, alleging that the appointment of Dr. Roberts was the result of gender-based discrimination,[1] and that Wilson had been dismissed in retaliation for having opposed that discrimination. While Wilson's charge was pending at the EEOC, the Fifth Circuit on May 15, 2002, decided *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642 (5th Cir. 2002). *Green* contained a footnote which stated in part:

> courts have held that when an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender.

284 F.3d at 656 n.6. *Green* cited no Fifth Circuit decisions on this issue; the footnote referred only to decisions in the Second and Eleventh Circuits. Footnote 6 neither applied nor endorsed the decisions of those other circuits. Rather, the Fifth Circuit in *Green* insisted that those cases were distinguishable from the circumstances of *Green* itself, and concluded that the adverse actions complained of in that case were unlawful. *Id.*

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[1] This underlying discrimination claim was dismissed by the district court on the ground that it was filed more than 180 days after the alleged discriminatory appointment had been made.

Wilson commenced this action on November 21, 2002 against Delta State University and several of its officials. His complaint alleged, inter alia, that he had been dismissed for opposing gender-based discrimination. Eight months later, the Fifth Circuit on August 1, 2003, squarely faced the question of whether favoritism for a paramour constitutes discrimination on the basis of gender, and held that such favoritism is not unlawful under Title VII. *Ackel v. National Communications, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003).

On June 21, 2004, Delta State filed an in limine motion regarding the admissibility of certain evidence at trial. On July 24, 2004, Delta State submitted a supplementary brief which for the first time cited *Ackel*, and argued that Wilson's actions were not protected activity under section 704(a). With the trial scheduled to begin in early August, the district judge denied the in limine motion.

On August 4, 2004, at the end of the plaintiff's case, Delta State moved for a directed verdict. Delta State argued that Wilson's action in criticizing the appointment of Roberts was not protected activity under Title VII because, the defendant contended, the favoritism for a paramour that Wilson had opposed does not constitute discrimination on the basis of sex. Counsel for plaintiff contended that Wilson's action was protected by section 704(a) so long as Wilson had a reasonable good faith belief that the preferential treatment in question constituted gender-based discrimination. The district judge granted the directed verdict motion from the bench.

Three weeks later, on August 24, 2004, the district judge issued a written Order reiterating its decision to